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No. 90-1229

In the Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL WASTE CONTROL, INC., D/B/A FOUR COUNTY LANDFILL, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred by permanently enjoining the operation of the Four County Landfill in this action challenging the Landfill's "interim status" to operate under the Resource Conservation and Recovery Act of 1976 (RCRA).

2. Whether the district court correctly ruled that the Four County Landfill lost its interim status to operate under RCRA because it failed to maintain sufficient insurance and an adequate groundwater monitoring system.

3. Whether the district court properly considered the claims raised by an intervenor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Amoco Production Co. v. *Gambell*, 480 U.S. 531 (1987)	8, 11
Chemical Waste Management, Inc. v. *EPA*, 649 F. Supp. 347 (D.D.C. 1986)	17
Crown v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1987)	13
Heckler v. *Community Health Services*, 467 U.S. 51 (1984)	13
Larson, In re, 862 F.2d 112 (7th Cir. 1988)	13
Northside Sanitary Landfill, Inc. v. *Thomas*, 804 F.2d 371 (7th Cir. 1986)	3, 14
Portmann v. *United States*, 674 F.2d 1155 (7th Cir. 1982)	13, 14
Telegraph Savings & Loan Ass'n v. *Schilling*, 807 F.2d 590 (7th Cir. 1986), cert. denied, 484 U.S. 818 (1987)	13
United States v. *T & S Brass & Bronze Works, Inc.*, 681 F. Supp. 314 (D.S.C. 1988), aff'd, 865 F.2d 1261 (4th Cir. 1988)	17
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982)	11

Statutes and rules:

Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98-616, 98 Stat. 3221	4

Statutes and rules—Continued: Page

Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* 2
§ 1003(b), 42 U.S.C. 6902(b) 3
§ 1004(5), 42 U.S.C. 6903(5) 3
§ 3005, 42 U.S.C. 6925 3
§ 3005(e), 42 U.S.C. 6925(e) 3, 9
§ 3005(e)(2), 42 U.S.C. 6925(e)(2) 4, 8, 11, 16, 17
§ 3008(h)(1), 42 U.S.C. 6928(h)(1) 8, 9, 10
§ 7002, 42 U.S.C. 6972 5
§ 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A) ... 18
42 U.S.C. 9613(i) 5, 18, 19
40 C.F.R.:
Pt. 260.10 5
Pt. 264 4
Pt. 265 3
Section 265.90 3
Section 265.91 ..... 14, 15
Section 265.91(a) 15, 16
Section 265.91(a)(2) 15, 16
Section 265.91(b)(1) 16
Section 265.91(b)(2) 16
Section 265.93 15
Section 265.93(a) 15
Section 265.147 ..... 3, 8, 12
Section 265.147(a) 12
Section 265.147(b) 12
Pt. 270.73 4
Fed. R. Civ. P. 24 19

Miscellaneous:

45 Fed. Reg. 33,192-33,193 (1980) 16
50 Fed. Reg. (1985):
p. 38,946 17
p. 38,948 17
p. 38,949 17

Miscellaneous – Continued:

Page

51 Fed. Reg. 3954 (1986) 14

S. Rep. No. 11, 99th Cong., 1st Sess. (1985) 19

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ENVIRONMENTAL WASTE CONTROL, INC., D/B/A FOUR COUNTY LANDFILL, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND SUPPORTERS TO OPPOSE POLLUTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Item 1) is reported at 917 F.2d 327. The opinion and order of the district court entering final judgment (Pet. App. Item 2) is reported at 710 F. Supp. 1172. The opinion of the district court granting partial summary judgment (Pet. App. Item 3) is reported at 698 F. Supp. 1422. The district court's opinion granting the motion to intervene (Pet. App. Item 5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1990. The petition for a writ of certiorari was

filed on January 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an enforcement action brought by the United States, on behalf of the Environmental Protection Agency (EPA), to enforce the hazardous waste requirements of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* The defendants include Environmental Waste Control, Inc., and the individual owners and operators of the Four County Landfill in Fulton County, Indiana (collectively, EWC). The district court, affirmed in all respects by the court of appeals, found that EWC, while "afforded repeated opportunities to comply with RCRA requirements[,] * * * has responded by developing a dismal history of delay, misperformance, and noncompliance." Pet. App. Item 2, at 332. More specifically, the district court held that EWC had failed to meet RCRA's financial responsibility and groundwater monitoring requirements and that there had been a release of carcinogenic wastes from the Landfill. The court assessed civil penalties of $2,778,000 (*id.* at 324), finding that "EWC has been faced more than once with a choice between disobeying the law or continuing its operations; each time, EWC chose to disobey the law and make more money." *Id.* at 323. In addition, the district court entered a permanent injunction closing the Landfill. It found that, given EWC's continuous violations, EWC has "demonstrated an inability to operate a hazardous waste facility in sufficient compliance with RCRA." *Id.* at 327-328, 332-333.

1. The Resource Conservation and Recovery Act established a comprehensive federal program governing the generation, transportation, storage, treatment, and disposal of hazardous wastes, in order to "to minimize the present

and future threat to human health and the environment." 42 U.S.C. 6902(b); Pet. App. Item 1, at 2.[1] Section 3005 of RCRA requires that hazardous waste facilities be operated only in accordance with a permit. 42 U.S.C. 6925. Recognizing that EPA could not issue permits to all applicants before the effective date of the relevant portions of RCRA, Congress provided that facilities in existence on November 19, 1980, could obtain "interim status," allowing them to continue to operate until final action was taken on their permit applications. 42 U.S.C. 6925(e); Pet. App. Item 1, at 2; see *Northside Sanitary Landfill, Inc.* v. *Thomas*, 804 F.2d 371, 373-374 (7th Cir. 1986).

To obtain interim status, facilities were required to file a "Part A" permit application, and were then "treated as having been issued [a] permit." 42 U.S.C. 6925(e); Pet. App. Item 1, at 2. Interim status facilities must comply with the standards set forth at 40 C.F.R. Pt. 265, which, among other things, require (1) "a ground-water monitoring program capable of determining the facility's impact on the quality of ground water in the uppermost aquifer underlying the facility" (40 C.F.R. 265.90) and (2) "financial responsibility" coverage for sudden and nonsudden occurrences (40 C.F.R. 265.147). Following submission of the Part A application, facilities must file a "Part B" application to obtain a permit. Pet. App. Item 1, at 3; *Northside Sanitary Landfill*, 804 F.2d at 374. Upon successful completion of the Part B application process, a hazardous waste permit is issued and the facility must comply with the permit, which

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[1] RCRA defines "hazardous waste" as any solid waste that may "cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness"; or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. 6903(5).

incorporates the regulatory standards set forth at 40 C.F.R. Pt. 264.

Congress in 1984 passed the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, 98 Stat. 3221, amending RCRA to provide for "loss of interim status" (LOIS). Congress enacted the 1984 amendments "in response to concerns about widespread groundwater contamination from interim status facilities." Pet. App. Item 1, at 3. The LOIS provision, 42 U.S.C. 6925(e)(2), provided that each land disposal facility granted interim status before November 8, 1984, would automatically lose that status on November 8, 1985, unless the facility (1) applied for a final Part B permit determination before November 8, 1985, and (2) certified that it was "in compliance with applicable groundwater monitoring and financial responsibility requirements." See 40 C.F.R. 270.73.

2. The Four County Landfill encompasses approximately 61.5 acres and is surrounded by rural and agricultural land. In 1980, EWC notified the EPA that it was disposing of hazardous wastes at the Landfill and submitted a Part A application, thus obtaining interim status to operate. Pet. App. Item 2, at 16, 24-25. In 1985, pursuant to the LOIS provision, EWC filed a Part B application and a certificate attesting to compliance with RCRA's financial responsibility and groundwater monitoring requirements. *Id.* at 31.

On February 5, 1987, the United States filed the complaint in this action which, as amended, stated four claims. The first claim asserted that, contrary to EWC's certification, the Landfill failed to meet RCRA's financial assurance and groundwater monitoring requirements on November 8, 1985. That count requested civil penalties and an injunction closing the Landfill. The second count asserted that from May 8, 1985, to August 19, 1986, EWC had violated RCRA's minimum technology requirements by placing hazardous waste in unlined cells and by failing to install

an adequate leacheate collection system.[2] That count requested civil penalties. The third claim alleged that EWC's ongoing groundwater monitoring system was inadequate and requested civil penalties and an injunction directing compliance. The fourth claim asserted that hazardous wastes had been released into groundwater beneath the Landfill and requested appropriate corrective action. Pet. App. Item 1, at 3-4; *id.* Item 2, at 13-14.

In July 1987, a group called Supporters to Oppose Pollution (STOP) moved to intervene. STOP relied on RCRA's citizens' suit provision, 42 U.S.C. 6972, as support for its intervention motion. Pet. App. Item 3, at 5; *id.* Item 2, at 49. The EPA responded that intervention was inappropriate under that provision, but advised STOP that 42 U.S.C. 9613(i) explicitly provides for intervention in RCRA cases. Pet. App. Item 3, at 5-6. The district court subsequently granted STOP's amended motion to intervene under Section 9613(i). Pet. App. Item 3, at 6. STOP's complaint incorporated by reference the four counts in EPA's complaint, and asserted 11 additional claims. *Ibid.* STOP also asked for a permanent injunction closing the Landfill. Pet. App. Item 1, at 4.

3. The district court entered partial summary judgment for the federal government on October 26, 1988, ruling, under Count 2, that EWC had placed hazardous wastes in unlined cells from May 8, 1985, until August 19, 1986. Pet. App. Item 3, at 46-53. The court denied summary judgment as to Count 1, finding that issues of fact remained as to EWC's insurance coverage and groundwater monitoring system as of November 8, 1985. *Id.* at 40-46.[3]

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[2] "Leacheate" is "any liquid * * * that has percolated through or drained from hazardous waste." 40 C.F.R. 260.10.

[3] At the same time, the court denied EWC's motion for partial summary judgment. Contrary to EWC's contentions, the court found that

The district court held a 30-day trial on the remaining issues. The court ruled as to Count 1 that EWC had failed to comply with RCRA's interim status requirements for insurance and groundwater monitoring, and therefore lost its legal authority to operate on November 8, 1985, pursuant to the LOIS provision. Pet. App. Item 2, at 129-202. More specifically, the court found that EWC's 1985 insurance policy provided total coverage, for sudden and nonsudden occurrences, of $3 million per occurrence and $6 million annual aggregate, while EPA's regulations required total coverage of $4 million/$8 million. *Id.* at 150-158. The court also held that EWC's monitoring system was inadequate to determine the facility's impact on the quality of the groundwater underlying the Landfill. *Id.* at 170-202.

The court found further, under Count 3, that EWC's groundwater monitoring violations continued past November 8, 1985, until trial. Pet. App. Item 2, at 210-226. In addition, the court determined as to Count 4 that there had been a broad-scale release of various hazardous wastes into the groundwater underlying the Landfill, involving significant concentrations of known and probable carcinogens. *Id.* at 226-240, 306-307.

Finding that for more than 2,000 days EWC had "operated illegally and made millions of dollars while doing so," the court assessed a penalty of $2,778,000, out of total potential penalties of $60,350,000. Pet. App. Item 2, at

EPA had express authority to bring an enforcement action in Indiana even though authority to enforce RCRA had been partially delegated to the State. Pet. App. Item 3, at 58-67. The court found that EPA had never delegated to Indiana authority to enforce RCRA's LOIS provision. *Id.* at 74-77. The court also rejected EWC's contention that the case was controlled by an earlier state administrative consent order between Indiana and EWC, in a proceeding designated as N-128, because the proceeding did not address the violations asserted in this action. *Id.* at 67-77.

307-324. The court also ordered EWC to implement a corrective action plan to remedy the hazardous conditions at the Landfill. See *id.* Item 2 App. 1-27.

In addition, the court ordered the closing of the Landfill. Given the court's conclusion that EWC had lost its interim status to operate, the court first held that the Landfill "cannot continue to operate" since it also lacked a Part B permit.[4] Pet. App. Item 2, at 202. The district court went on to grant STOP's motion for a permanent injunction closing the Landfill, finding that the "risk to the public of any continued operation of the Four County Landfill by EWC greatly outweighs any harm from permanent closure." *Id.* at 325-333. The court stated that a permanent injunction "should be granted only in unusual, perhaps extraordinary cases," and that "something must be shown beyond a simple violation of RCRA." *Id.* at 326-327. The court found "far more with respect to EWC." *Id.* at 327. The record "reflects that EWC has long failed to comply with various RCRA requirements, despite regular reminders and notices from state and federal regulators." *Id.* at 327-328. The court stated that EWC repeatedly failed to meet deadlines for implementing a groundwater monitoring system, submitted inadequate groundwater assessment plans, and continued to accept hazardous wastes into unlined cells. *Id.* at 328-331. Moreover, despite warnings, EWC failed to cover exposed hazardous waste, "allowing carcinogenic hazardous waste constituents to be swept from the site into the surrounding area by wind and surface water." *Id.* at 331. The court accordingly found that EWC, despite repeated opportunities to comply with RCRA, had "responded by developing a dismal history of delay, misperformance, and non-

[4] Both Indiana and EPA denied EWC's application for a final Part B permit in 1988. EWC has appealed those denials. See Pet. App. Item 3, at 68-69.

compliance." *Id.* at 332. The court concluded that EWC had "demonstrated an inability to operate a hazardous waste facility in sufficient compliance with RCRA" and therefore held that petitioners "should be enjoined permanently from operating a hazardous waste facility at the Landfill site." *Id.* at 333.

4. The court of appeals affirmed. Pet. App. Item 1. The court held that "it is clear from the language of [42 U.S.C. 6928(h)(1)] that a permanent injunction is an available remedy in interim status cases." Pet. App. Item 1, at 6. The court also found that the district court properly balanced the equities. *Ibid.* The district court, "in fact, went to great pains to outline the reasons (which included threats to the environment) for its decision," and "specifically undertook to balance the benefit to the public against the harm to the public in this case." *Ibid.* The court of appeals concluded that it is "beyond question, given the district court's findings, that a remedy at law would have been inadequate in this case." *Ibid.*, citing *Amoco Production Co.* v. *Gambell*, 480 U.S. 531, 545 (1987).

The court of appeals also affirmed the district court's determination that the Four County Landfill lost its interim status to operate on November 8, 1985. Pet. App. Item 1 at 8-11. The court held that EWC failed to carry the insurance of $4 million per occurrence and $8 million annual aggregate required by 40 C.F.R. 265.147. Pet. App. Item 1, at 8-9.[5] The court added that the LOIS provision, 42 U.S.C. 6925(e)(2), requires actual compliance, not merely

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[5] The court found that, under 42 U.S.C. 6925(e)(2), the failure to meet either financial responsibility or groundwater monitoring requirements as of November 8, 1985, automatically resulted in the loss of interim status. Pet. App. Item 1 at 8. Given its finding that EWC failed to have adequate insurance, the court did not address the district court's holding that EWC also failed, for LOIS purposes, to have an adequate groundwater monitoring system. *Ibid.*

a "good faith" certification Pet. App. Item 1, at 11 n.4. The court also affirmed the district court's holding, under Count 3, that EWC's groundwater monitoring system remained inadequate until trial, and affirmed the court's corrective action plan and other remedies. *Id.* at 11-13.

ARGUMENT

Petitioners seek review of narrow issues of statutory interpretation concerning RCRA and its implementing regulations and of factual determinations made by the lower courts based on the 30-day trial record. The lower courts' decisions are correct, do not conflict with any decision of this Court or any other court of appeals, and raise no issue warranting review by this Court.

1. Petitioners assert, as a question of statutory interpretation (Pet. 23-26), that RCRA does not, in an interim status action, authorize the issuance of a permanent injunction. As the court of appeals noted, this issue was not raised before the district court and "in all likelihood, EWC has waived this argument." Pet. App. Item 1 at 5. In any event, the statute is clear. Section 3008(h)(1) of RCRA, entitled "Interim status corrective action," states that whenever EPA determines that there is or has been a release of hazardous waste from a facility having interim status to operate under 42 U.S.C. 6925(e), EPA may commence a civil action "for appropriate relief, including a temporary or permanent injunction." 42 U.S.C. 6928(h)(1). Thus, as the court of appeals held, "it is clear from the language of this section that a permanent injunction is an available remedy in interim status cases" like this one. Pet. App. Item 1, at 6.

Petitioners nevertheless assert that authority to issue permanent injunctions in cases involving interim status violations conflicts with RCRA's statutory framework by interfering with the Part B permit process. But Congress

clearly intended to authorize permanent injunctive relief apart from Part B permit proceedings. Section 3008(h)(1) does not condition injunctive relief on, or even allude to, Part B proceedings. Rather, it grants district courts authority in "interim status corrective actions" to provide the relief that is "appropriate" to the circumstances, including a "permanent injunction."[6] As the district court stated, a permanent injunction "should be granted only in unusual, perhaps even extraordinary, cases." Pet. App. Item 2, at 326-327. However, it is clear that district courts have the authority to issue permanent injunctions in interim status cases where the evidence shows egregious violations.

The district court found just such an abysmal record of noncompliance in this case, holding that the "risk to the public of any continued operation of the Four County Landfill by EWC greatly outweighs any harm from permanent closure." Based on the 30-day trial record, the court found that EWC had "long failed to comply with various RCRA requirements"; had failed to submit adequate groundwater monitoring and compliance information; had continued to accept hazardous waste for disposal into unlined cells; and, despite being warned repeatedly, failed "to apply cover to exposed hazardous waste," allowing it to disperse offsite. Pet. App. Item 2, at 327-333. Based on EWC's "dismal history of delay, misperformance, and noncompliance," the court concluded that there was "too little reason to believe that lesser injunctive relief would achieve compliance with RCRA." *Id.* at 332-333.[7]

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[6] Petitioners also state (Pet. 24-25) that the power to grant permanent injunctions gives to federal district courts "powers expressly delegated to expert government agencies." But, not surprisingly, the statute gives the courts, and not EPA, the authority to issue permanent injunctions.

[7] Given this extensive record, petitioners' claim (Pet. 26-32) that the district court failed to balance the equities properly is incorrect. The

Petitioners, at bottom, are simply displeased with the balance reached by the district court in finding that there is "ample reason why the Landfill should be closed." Pet. App. Item 2, at 333. While EWC would have preferred a different result, the district court based its decision on the extensive trial record and the court of appeals found that the record supported the district court's permanent injunction. There is no good reason for further review.[8]

2. The courts below also correctly held that EWC lost its interim status to operate on November 8, 1985. Section 3005(e)(2) of RCRA provided that interim status "shall terminate" on November 8, 1985, unless a facility certifies that it is in compliance with both the financial responsibility and the groundwater monitoring requirements. 42 U.S.C. 6925(e)(2). EWC failed to satisfy either requirement, leaving it without authority under RCRA to continue operations. Pet. App. Item 1, at 8-11; *id.* Item 2, at 202.

a. Petitioners advance a myriad of claims as to its insurance coverage, all of which were soundly rejected by the lower courts. EWC primarily contests (Pet. 33-36) the holding that EPA's interim status regulations required it to maintain coverage of $4 million per occurrence and $8 million annual aggregate. But those regulations, set forth

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court's analysis was well within the standards set forth in *Amoco Production Co.* v. *Gambell*, 480 U.S. 531 (1987), and *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The court of appeals properly reviewed the record and concluded that "the district court did balance the competing equities both thoroughly and correctly in this case." Pet. App. Item 1, at 7, citing *Amoco Production Co.* v. *Gambell*, 480 U.S. at 545.

[8] Petitioners also question the court of appeals' statement that the district court correctly balanced the equities "notwithstanding that it may not have even been required to undertake such a balance." Pet. 29-31; see Pet. App. Item 1, at 7. That tentatively stated suggestion, however, is plainly dictum.

at 40 C.F.R. 265.147, are clear. Subsection (a) states as to hazardous waste treatment, storage, or disposal facilities that:

> The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs.

Subsection (b) requires as to surface impoundments, landfills, or land treatment facilities that:

> The owner or operator must have and maintain liability coverage for nonsudden accidential occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs.

Petitioners do not dispute that the Four County Landfill is a facility as defined by both subsections. Rather, it contends that, because the regulations did not actually add up the two coverages for facilities subject to both subparts, those facilities need only obtain a combined policy meeting the higher of the separate requirements. Pet. 34. The regulations, however, "do not allow an owner or operator to comply with either, but not both, of the regulatory requirements." Pet. App. Item 2, at 153. As the district court said, EWC "seeks to ante twice with the same chip." *Ibid.* Indeed, if nonsudden occurrence claims of $6 million or more had occurred in a given year, petitioners would have been uninsured for sudden occurrence claims. As the court of appeals held, the "separate subparts applied to different types of occurrences," each subpart "had to be satisfied," and "[a]ggregation was therefore required." *Id.* at 10.[9]

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[9] While draft regulations proposed in 1981 contained an aggregation provision, "[i]f the regulations were not ambiguous as adopted, the

Petitioners contend (Pet. 37-39) that, even if EWC had insufficient insurance, EPA should be estopped from enforcing RCRA because of purported discussions over the EPA "hotline." As the court of appeals found, however, "reliance on such a hot line here was not reasonable, given the clarity of the regulations." Pet. App. Item 1, at 10.[10] Moreover, EWC's argument ignores the facts. EWC's insurance agent testified only that he was told by the hotline that insurance coverage was "three million-six million," and his contemporaneous note states that "EPA Hotline need 3/6 mil." C.A. App. 287, *id.* at 278. There is no indication of what type of coverage was under discussion, or reference to subparts (a) or (b) or the regulations. The discussion could readily have concerned subpart (b) only, which alone requires landfills to obtain nonsudden coverage of $3 million/$6 million, precisely the amounts noted by the agent. It is because of such potential misunderstanding that asserted oral representations of government officials are so suspect. *Heckler* v. *Community Health Services*, 467 U.S. 51, 64-65 (1984). Petitioners also make no showing of

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the history of their development cannot render them so." Pet. App. Item 2, at 156; *id.* Item 1, at 10. Similarly, the addition in 1988 of an aggregation provision was, as the court of appeals found, meant to clarify, rather than alter, existing law. *Id.* at 10. See *Telegraph Savings & Loan Ass'n* v. *Schilling*, 807 F.2d 590, 593 (7th Cir. 1986), cert. denied, 484 U.S. 818 (1987).

[10] The Seventh Circuit recognizes that estoppel may be applied to the federal government in "certain narrow circumstances." *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017, 1021 (1987). The party claiming estoppel must establish "*at least* the traditional prerequisites," including misrepresentation, reasonable reliance, and detriment. *In re Larson*, 862 F.2d 112, 115 (7th Cir. 1988). In addition, courts must find "affirmative misconduct" and consider "the potential danger, posed by estoppel, of undermining important federal interests." *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982).

affirmative misconduct, which must be "something more than mere negligence." *Portmann*, 674 F.2d at 1167.[11]

Petitioners next argue that even if EWC was required to maintain $4 million/$8 million coverage, Endorsement 3 of its 1985 St. Paul policy contains general language automatically expanding coverage to any amount required by RCRA. Pet. 39-41. As the court of appeals recognized, however, Endorsement 3 "clearly states that it does not modify the policy, the terms of which were only $3,000,000 per occurrence and $6,000,000 in the aggregate." Pet. App. Item 1, at 11. In any event, whether the court of appeals correctly construed the provisions of a specific insurance contract does not warrant review by this Court.[12]

b. The district court also held that EWC lost its interim status to operate on account of its failure to have an adequate groundwater monitoring system in place on November 8, 1985, as required by 40 C.F.R. 265.91. Pet. App. Item 2, at 170-201. That regulation requires the installation of

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[11] Petitioners similarly assert that the Indiana Department of Environmental Management (IDEM) "approved EWC's 1985 coverage" and "that assessment is binding on EPA." Pet. 36-37. EWC fails to note, however, that while EPA delegated certain RCRA authorities to Indiana, it never delegated authority to enforce the loss of interim status requirements set forth in the 1984 Hazardous and Solid Waste Amendments. Pet. App. Item 1, at 8 n.3; *id.* Item 2, at 29. See 51 Fed. Reg. 3954 (1986) ("Indiana is not being authorized now for any requirement implementing HSWA."); *Northside Sanitary Landfill* v. *Thomas*, 804 F.2d 371, 373-374 (7th Cir. 1986). The record, in any case, demonstrates no action by Indiana purporting to enforce the HSWA's interim status requirements with respect to EWC's insurance.

[12] Nor does EWC's argument concerning a second insurance policy, issued by the Pacific Insurance Company for the term of June 28, 1982, to June 28, 1983, warrant this Court's attention. As the court of appeals concluded, the Pacific policy "had probably expired" (Pet. App. Item 1 at 11) and the issue is not one of exceptional importance in any event.

at least three monitoring wells hydraulically downgradient "at the limit of the waste management area" to "immediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to the uppermost aquifer." 40 C.F.R. 265.91(a)(2).[13]

Petitioners do not challenge the district court's findings that as of November 8, 1985, its downgradient monitoring wells were located as far as 285 feet from the area in which waste had been placed. See Pet. 44; Pet. App. Item 2, at 173. Rather, EWC asserts that it was not required to place downgradient wells "at the limit of the waste management area" because its obligations had shifted from what it calls a "detection mode" under 40 C.F.R. 265.91(a) to an "assessment mode" under 40 C.F.R. 265.93. Pet. 45-48; Pet. App. Item 2, at 175.

That theory is flatly contradicted by the regulations, which establish the assessment program under Section 265.93 as part of a progression of increasing responsibilities, not lesser duties, as potential contamination is detected. That progression begins with Section 265.91, which defines the required "groundwater monitoring system" and which specifies the placement of downgradient wells. Section 265.93(a), in turn, requires an outline for an "assessment program" which must provide "a more comprehensive ground-water monitoring program" if problems are identified. Thus, the assessment program must be "more comprehensive" than, not in lieu of, the monitoring required by Section 265.91(a). "Nothing in the regulations or in logic indicates that the facility may, upon detection of indicia of migration of hazardous waste constituents, abandon the

[13] "Hydraulically downgradient" refers to the part of the aquifer through which groundwater flows after it passes through or past the hazardous waste. "Downgradient" in an aquifer is analogous to "downstream" in a river. See Pet. App. Item 2, at 170 n.32.

monitoring wells and the originally required locations." Pet. App. Item 2, at 182.[14]

Petitioners also quarrel with the district court's ruling that the "limit of the waste management area" means the limit of where wastes have been placed. Pet. App. Item 2, at 192-200. EWC asserts, instead, that it may install its wells where wastes might some day be placed, and that its downgradient wells thus complied even though they were located hundreds of feet from the hazardous wastes. Pet. 49-50. The goal of locating wells "at the limit of the waste management area," however, is to "immediately detect any statistically significant amounts of hazardous waste * * * that migrate from the waste management area to the uppermost aquifer." 40 C.F.R. 265.91(a)(2). To meet that objective, the regulations state that, for facilities consisting of one surface impoundment, landfill, and land treatment area, the waste management area "is described by the waste boundary (perimeter)"; and for facilities of more than one such area, it "is described by an imaginary boundary line which circumscribes the several waste management components." 40 C.F.R. 265.91(b)(l) and (2). The preamble to the regulations, in fact, rejected the very position EWC now asserts. Pet. App. Item 2, at 199; see 45 Fed. Reg. 33,192-33,193 (1980).

c. Petitioners also contend (Pet. 51-55) that RCRA's interim status provision, 42 U.S.C. 6925(e)(2), does not require compliance with financial responsibility or ground-

[14] Petitioners also assert (Pet. 45-49) that EWC was precluded from installing additional wells by a consent order which it entered with Indiana in June 1985 in Cause N-128. As the district court found, however, the N-128 decree did not even address detection requirements under 40 C.F.R. 265.91(a), which are the basis for EPA's loss of interim status claim here. Pet. App. Item 2, at 186-187. Moreover, Indiana was never authorized to enforce the LOIS provision. *Id.* Item 3, at 58-67.

water monitoring standards, but only a "good faith" certification. As an initial matter, EWC fails to note that the district court found "no good faith in EWC's failure to comply with groundwater monitoring requirements," given EWC's record of conduct. Pet. App. Item 2, at 311.

Moreover, as the district court stated, "[i]f EWC is correct, Congress simply intended to flood the EPA with meaningless certifications and not to assure compliance with regulations governing hazardous waste." Pet. App. Item 2, at 133. Congress's purpose, however, in adding the LOIS provision in 1984 was "to encourage compliance with the basic requirements of the interim status regulations, particularly the groundwater monitoring and financial responsibility requirements." *United States* v. *T & S Brass & Bronze Works, Inc.*, 681 F. Supp. 314, 316 (D.S.C. 1988), aff'd, 865 F.2d 1261 (4th Cir. 1988).[15] To that end, 42 U.S.C. 6925(e)(2) provides that interim status "shall terminate" unless a facility certifies that it is "in compliance." It does not state that interim status continues if a facility certifies it is "in good faith compliance."[16] Thus, while good faith may be relevant to the scope of relief and penalties,

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[15] The court in *T & S Brass* held that good faith was not a defense where a facility was unable to obtain insurance. 681 F. Supp. at 319. Similarly, in *Chemical Waste Management, Inc.* v. *EPA*, 649 F. Supp. 347, 352, 355 (D.D.C. 1986), the court held that reliance on consultants did not excuse improper placement of downgradient wells.

[16] Similarly, EPA's implementation policy for interim status standards, published on September 25, 1985, stated that to certify compliance, a "facility must be in 'physical compliance,'" meaning that it "has 'physically' in place all that is specified in the applicable Federal or State groundwater monitoring and financial responsibility requirements." 50 Fed. Reg. 38,946, 38,948 (1985). It stated further that a facility "not in compliance with applicable ground-water monitoring and/or financial responsibility requirements * * * may not certify compliance." *Id.* at 38,949.

it is, as the lower courts recognized, "not relevant to whether EWC actually complied with the federal requirements." Pet. App. Item 1, at 11 n.4.

3. Petitioners also challenge (Pet. 55-60) the district court's decision to consider the claims brought by the intervenor. EWC asserts first that STOP failed to comply with the notice requirement applicable to RCRA's citizens' suit provision. The notice requirement provides that "[n]o action may be commenced under subsection (a)(1)(A)" prior to 60 days after notice, "except that such action may be brought immediately after such notification" in an action alleging violations of subchapter III of RCRA. 42 U.S.C. 6972(b)(1)(A).

There are two basic defects in petitioners' contention. First, STOP's complaint asserts violations of subchapter III of RCRA. Pet. App. Item 2, at 55. Hence it is excused from the 60-day requirement by the terms of the statute. Second, STOP did not bring a citizens' suit under 42 U.S.C. 6972(a)(1)(A). Rather, it intervened under 42 U.S.C. 9613(i). See Pet. App. Item 3, at 5-6. That provision states that "[i]n any action commenced under * * * [RCRA] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action" and contains no notice requirement. Thus, in moving to intervene in the pending action by the United States, STOP was not subject to a notice requirement.[17]

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[17] The district court said that STOP's claims which go beyond those asserted by the United States "must be viewed more properly as having been in the nature of a citizens' suit under § 6972(a)(1)(A)." Pet. App. Item 2, at 53. The fact, however, that an intervenor seeks to protect interests that the United States has elected not to raise in a particular action does not convert an intervention under Section 9613(i) into a citizens' suit under Section 6972(a)(1)(A). Nothing in the statute suggests that intervention should be treated as a citizens' suit under such circumstances.

Petitioners also challenge (Pet. 61-64) the district court's ruling that EWC had no standing under Section 9613(i) to object to the intervention. The statute, however, provides for intervention of right "unless the President or the State shows that the person's interest is adequately represented by existing parties." 42 U.S.C. 9613(i). The district court thus held that "the only party authorized to respond to STOP's motion [to intervene] is the President or the State," and "the defendants have no standing to question the parameters of the intervenors' complaint." Pet. App. Item 3, at 81, 83.[18] In the absence of a conflict, there is no need for further review of this issue.

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[18] The limited legislative history of the intervention provision supports the holding. The Senate Report states that its intent was to assure that persons living in close proximity "to the subject of the government-initiated action will be able to intervene as a matter of right unless the President or State can demonstrate that those persons' interests are being adequately represented." S. Rep. No. 11, 99th Cong., 1st Sess. 63 (1985).

There is no mention of defendants' standing to object. Indeed, the "purpose of the amendments is to make it easier for individuals who may be assuming an imminent and substantial risk as a result of the defendant's activities to participate in these suits." *Ibid.* Thus, the statute "reverses the normal presumption" of Fed. R. Civ. P. 24 by "requiring the government to demonstrate that the applicant's interests are already represented." S. Rep. No. 11, *supra*, at 63.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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